IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CAROL F. CORREN, dba CAFCO REALTY, Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF LICENSING BUSINESS AND PROFESSIONS DIVISION, RE: OAH DOCKET NO. 2003 DOL-0020 NO. 2001-09-0014 REA, Respondent.	)	DIVISION ONE No. 56650-4-I **UNPUBLISHED OPINION** FILED: August 14, 2006

BAKER, J. — Carol Corren appeals the Director of the Department of Licensing's order revoking her real estate broker license for five years. We conclude that the Administrative Law Judge (ALJ) did not abuse her discretion by denying Corren's motion for a continuance, the hearing had the appearance of fairness, and the Director's conclusions are supported by the ALJ's factual findings. We affirm

I.

Corren was licensed as a real estate agent and broker, doing business as Cafco Realty, Inc. The owners of real property located in Point Roberts hired Corren to list their property for sale.

Angelita Marie Cantu, a potential buyer, obtained a "highlights flyer" marketing the property. The flyer described the property, stating: "New septic system has been installed, septic tank and drain field, new roof, new paint job on the outside, excellent value and good investment." The flyer also noted the address and phone number of Cafco Realty, listed Corren as the broker, and specified a listing price of $55,000.

In June 2001, Cantu entered a purchase and sale agreement (PSA) with the sellers. Cantu contacted Elliot Gault of Ocean Construction, who is a licensed septic installer. After conducting a flow test to determine how fast water flowed through the septic tank and into the drain field, Gault advised Cantu that the septic system was "definitely shot." On June 28, Cantu withdrew her offer.

Subsequently, Corren faxed Peter Dashkewytch a copy of the highlights flyer. On June 30, Dashkewytch and his wife offered to purchase the property for $45,000, tendering $1,500 earnest money. The sellers accepted this offer. Corren acted as a dual agent, representing both the buyers and the sellers.

The PSA between Dashkewytch and the sellers indicated that a "new septic tank is being installed and drain field expanded, paid for by sellers out of $1,500 deposit," the earnest money was to be "paid to agent who will pay for septic tank and work," and "any monies left over after payment of septic work goes to sellers."

Corren accepted the $1,500 earnest money, but did not place it in a trust account. In fact, Corren did not maintain a trust account.

Corren contacted Austin Owens to complete the septic system work and paid him $700 in advance. After meeting Owens at the property, Dashkewytch told Owens

to refrain from performing any work because he was concerned about Owens's ability to complete the work satisfactorily. Owens did not perform any work, but kept the $700.

Subsequently, the sale closed. Because the septic system was not replaced, Dashkewytch demanded return of the $1,500. Corren returned only $300 to Dashkewytch.[1]

In September, Dashkewytch filed a formal complaint against Corren with the Business and Professions Division of the Department of Licensing. Dashkewytch also filed a small claims action against Corren to recover $1,200 of the earnest money. The Whatcom County District Court issued a judgment in Dashkewytch's favor in November 2001, and ordered Corren to pay him $1,225 (including $125 for the filing fee).

In November 2002, the Department issued a statement of charges against Corren, alleging that she engaged in misrepresentation and conversion in contravention of her duties under chapters 18.85 and 18.86 RCW. Corren requested a hearing on the matter.

In July 2003, the parties agreed to a December 2 deadline for filing witness and exhibit lists and a hearing date of January 21 and 22, 2004. At that time, Corren was represented by attorney Thomas Flattery.

On November 24, 2003, Flattery filed a notice of intent to withdraw as Corren's

[1] Corren explained that she had a septic tank installation contract with Owens for $1,200 and she paid Owens $700. Corren maintained that the sellers were entitled to $300 because Owens agreed to do the work for $1,200 and, under the PSA, she was required to give the sellers any money left over after the septic work was completed. Out of the remaining $500, Corren kept $200 for a table and chairs set, which she had purportedly purchased from the sellers. The table and chairs were in Dashkewytch's possession after he acquired the real property.

attorney, effective December 5. He stated that he reached irreconcilable differences with Corren. Flattery indicated that he was unsure whether Corren would proceed pro se or obtain new counsel, but requested a continuance in the event that Corren wanted to obtain new counsel. Corren received notice of Flattery's withdrawal. The requested continuance was denied.

On December 2, the Department served Corren its list of exhibits and witnesses. Corren did not reciprocate.

On December 22, the ALJ sent a letter to the parties indicating that, because Corren had not communicated with her since Flattery's letter of withdrawal, the hearing would occur on the previously scheduled dates.

On January 13, Corren called the ALJ by phone and requested a continuance. The ALJ denied her request. After Corren moved for reconsideration, the ALJ held a prehearing conference on January 20. The parties agreed that Corren was in Mexico from mid-November to December 20. She did not arrange for the handling of her business affairs or correspondence. When she returned, she made no attempt to retrieve her correspondence until January 10. As of January 20, Corren had made no attempt to obtain another attorney. The ALJ again denied Corren's request for a continuance.

During the hearing, the ALJ asked Corren if she was planning to testify. Corren responded, "Well, if they want me to." The ALJ then told her, "Well, I think you should probably testify." Corren testified.

The ALJ issued proposed findings of fact, conclusions of law, and an initial order

that Corren's actions violated the law and warranted revocation of her real estate broker license for a period of five years.

Corren petitioned for review by the Director of the Department of Licensing. Corren attached certain documents to her appeal that were not admitted as evidence during the administrative hearing. The Director granted the Department's motion to exclude those documents from his review. He affirmed the proposed findings of fact, conclusions of law, and initial order, and revoked Corren's license for five years.

Corren petitioned the superior court for review. The Department filed the administrative record for judicial review. Subsequently, the court granted Corren's motion to compel the Department to produce certain documents for judicial review, including all reports and correspondence associated with the Department's investigation into the matter. The court affirmed the Director's order on July 29, 2005.

II.

Chapter 34.05 RCW governs our review of the Director's order.[2] We review the order on the same basis as the superior court, looking only at the record before the administrative agency.[3]

Corren first argues that the ALJ erred by denying her motion for a continuance because she did not have time to obtain new counsel, in contravention of her Sixth

[2] RCW 34.05.510; Valentine v. Dep't of Licensing, 77 Wn. App. 838, 843, 894 P.2d 1352 (1995).

[3] Valentine, 77 Wn. App. at 844; Peter M. Black Real Estate Co. v. Dep't of Labor & Indus., 70 Wn. App. 482, 486, 854 P.2d 46 (1993). We note that the superior court erred by ordering the Department to produce documents that were not admitted during the administrative hearing or otherwise part of the record before the ALJ and the Director. The error does not affect the outcome of this appeal, however.

Amendment right to counsel.

The Sixth Amendment is inapplicable to civil cases.[4] Whether to grant a motion for a continuance is a matter within the ALJ's discretion.[5] "In exercising its discretion, a court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court."[6] We review the decision for a manifest abuse of discretion, which occurs when the decision is based on clearly untenable or manifestly unreasonable grounds.[7]

Corren was on notice in July 2003 that a hearing would be held on January 21 and 22 of the following year. Corren also knew on or before November 24, 2003 that her attorney was withdrawing. Yet, she made no attempt to secure another attorney or even check whether the ALJ had granted a continuance. Further, she did not arrange for the handling of her correspondence or affairs while she was in Mexico for a month. And, although Corren returned to Washington on December 20, she did not bother to retrieve her correspondence until January 10. Meanwhile, the Department gave Corren its list of exhibits and witnesses on the required date, secured a court reporter, and subpoenaed its witnesses for the hearing.

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[4] Chmela v. Dep't of Motor Vehicles, 88 Wn.2d 385, 392, 561 P.2d 1085 (1977); Willapa Trading Co. v. Muscanto, Inc., 45 Wn. App. 779, 785, 727 P.2d 687 (1986).

[5] Trummel v. Mitchell, 156 Wn.2d 653, 670, 131 P.3d 305 (2006).

[6] Trummel, 156 Wn.2d at 670-71.

[7] Trummel, 156 Wn.2d at 670-71.

Because Corren made no effort to obtain counsel in the two months following Flattery's withdrawal, she did not show good cause for a continuance. The ALJ did not abuse her discretion.

Next, Corren argues that the ALJ contravened her Fifth Amendment right against self-incrimination by recommending that she testify during the hearing. Corren argues that the hearing in front of the ALJ is a criminal case for purposes of the Fifth Amendment because it is quasi-criminal in nature.

Although the proceeding is quasi-criminal because of its punitive aspects,[8] it is not a criminal prosecution and therefore "the full panoply of constitutional rights does not attach."[9] Corren cites no authority extending the Fifth Amendment protection to a license revocation proceeding. Regardless, Corren has not shown that she was compelled to testify. Involuntariness is central to the right against self-incrimination.[10]

When cross-examining the Department's witnesses, Corren attempted to make statements, rather than ask questions. The ALJ repeatedly told her that she could not make statements that way. When it was Corren's turn to respond, she did not make an opening statement and called no witnesses. The ALJ asked Corren if she was planning to testify. Corren responded, "Well, if they want me to." The ALJ then told her, "Well, I think you should probably testify," and explained, "[y]ou were trying to make some statements through your questions and I wouldn't let you do that, because that wasn't the appropriate time."

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[8] Clausing v. State, 90 Wn. App. 863, 874, 955 P.2d 394 (1998).
[9] Kinder v. Mangan, 57 Wn. App. 840, 844, 790 P.2d 652 (1990).
[10] City of Seattle v. Stalsbroten, 138 Wn.2d 227, 232, 978 P.2d 1059 (1999).

It is clear that the ALJ was only attempting to provide Corren with an opportunity to tell her story. Corren agreed to testify without objection or hesitation. The ALJ did not compel her to testify.

Corren also claims that irregularities in the administrative proceeding deprived her of due process and the appearance of fairness. Specifically, she points to the ALJ's denial of her motion for a continuance, her "compulsion" to testify, ex parte communication between the ALJ and the attorney general's office, false testimony that Gault was licensed to inspect the septic systems, the Director's refusal to consider evidence that was not admitted during the hearing, and the Department's failure to produce the record for review in a timely manner.

Because an administrative proceeding to revoke a professional license is quasi-criminal, Corren was entitled to certain due process protections.[11] Due process requirements vary depending on what each situation demands.[12] At a minimum, due process requires notice and the opportunity to be heard by an unbiased decisionmaker.[13]

The appearance of fairness doctrine provides additional procedural protection, beyond the minimum requirements of the due process clause.[14] It requires that an agency not only act fairly, but also act with the appearance of fairness.[15] Under this

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[11] Clausing, 90 Wn. App. at 874.

[12] Sherman v. State, 128 Wn.2d 164, 184, 905 P.2d 355 (1995) (citing Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

[13] Sherman, 128 Wn.2d at 184.

[14] Wash. Med. Disciplinary Bd. v. Johnston, 99 Wn.2d 466, 478, 663 P.2d 457 (1983).

[15] Clausing, 90 Wn. App. at 874.

doctrine, the proceeding before the ALJ is valid "only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing."[16] The doctrine is directed at the evil of a biased or potentially interested decisionmaker.[17] To succeed on an appearance of fairness claim, Corren must show actual or potential bias.[18]

Corren has not alleged that the ALJ was actually or potentially biased. Furthermore, the hearing had the appearance of fairness.

As mentioned, the ALJ did not err by denying Corren's motion for a continuance or compel Corren to testify in contravention of the Fifth Amendment.

To support her claim of ex parte communications between the ALJ and the attorney general's office, Corren directs us to a letter written by the ALJ. The purpose of this correspondence was to notify Corren of a letter that the ALJ received from the attorney general's office, enclose a copy of the letter for Corren's consideration, and inform the attorneys that future correspondence addressed to her must also be sent to the other party. In other words, the ALJ wrote this letter in an attempt to ensure that the proceeding was open and fair.

Contrary to Corren's assertion, Gault never testified that he was a licensed inspector. Rather, he testified that he was a licensed septic installer.

The Director rightly refused to consider evidence that was not considered by the ALJ. Under chapter 34.05 RCW, the Director's review of an initial order is limited to

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[16] Johnston, 99 Wn.2d at 478 (citing Swift v. Island County, 87 Wn.2d 348, 361, 552 P.2d 175 (1976)).

[17] State v. Post, 118 Wn.2d 596, 618-19, 826 P.2d 172, 837 P.2d 599 (1992).

[18] Post, 118 Wn.2d at 619.

the record before the ALJ.[19]

Finally, the fact that the Department submitted the agency record for judicial review past the statutory deadline has nothing to do with whether Corren received due process during the administrative proceeding, and it does not require judgment in favor of Corren. RCW 34.05.570(4)(b) provides a remedy for the Department's failure to timely transmit the agency record to the superior court.[20]

Corren was afforded due process and the administrative hearing had the appearance of fairness.

Lastly, Corren argues that "substantial evidence" does not support the conclusions that she violated former RCW 18.85.230(5) and (7)[21] and WAC 308-124C-040(2). Corren has not challenged the Director's conclusions that she violated former RCW 18.85.230(4) and (26), as well as RCW 18.86.030(a), (b), (d) and (e). She has not assigned error to any of the ALJ's findings of fact. Therefore, all of the ALJ's findings are established facts on appeal.[22] The facts support the Director's conclusions of law,[23] and those conclusions fully support the Director's decision to revoke Corren's license.

AFFIRMED.

s/ Baker, J.

WE CONCUR:

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[19] Towle v. Dep't of Fish & Wildlife, 94 Wn. App. 196, 204, 971 P.2d 591 (1999).
[20] Trohimovich v. State, 90 Wn. App. 554, 557, 952 P.2d 192 (1998).
[21] Former RCW 18.85.230 (Laws of 2002, ch. 86, § 230).
[22] Eidson v. Dep't of Licensing, 108 Wn. App. 712, 727, 32 P.3d 1039 (2001) (citing In re Discipline of Brown, 94 Wn. App. 7, 13, 972 P.2d 101 (1998)).
[23] Eidson, 108 Wn. App. at 727.

s/ Dwyer, J._____ s/ Becker, J._____